No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware Corporation,
Defendant and Appellee.

PETITION FOR A REHEARING.

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To the Honorable Albert Lee Stephens, William E. Orr and Richard H. Chambers, Circuit Judges:

Comes now appellee and petitions for rehearing as follows:

I.

GROUNDS FOR A REHEARING.

It is now apparent from the decision on file herein that in our previous brief we did not sufficiently isolate and discuss the points of law deemed by the Court to be controlling here. Believing as we did that the determination of the nature of the causes of action was a matter for the application of Oregon

law, we did not adequately point out to the Court our reasons therefor, and our contention that the application of California law will in any event produce the same result. Accordingly, our principal grounds for rehearing are:

1. That the decision, while correctly stating that initial characterization is a matter for the forum, erroneously assumes that the determination of the nature of the cause of action is likewise a matter for application of forum law.

2. That examination of applicable California statutory and case law indicates that the cause of action under the Oregon Workmen's Compensation Act properly falls within the one-year statute of limitations.

II.

THE DETERMINATION OF THE NATURE OF THE CAUSE OF ACTION ON THE OREGON WORKMEN'S COMPENSATION LAW IS A MATTER FOR THE APPLICATION OF OREGON LAW.

The decision states:

> "Characterization of actions should be made in accordance with the law of the forum. . . ."

Of course, characterization is not a single-step process. In this case, for example, it is necessary for the Court to arrive at a preliminary delineation of the field of law covered in order that the appropriate conflicts rule may be selected. Thus, the first question

that arises in this action is whether the action lies basically in tort or is *quasi ex contractu* as arising out of the employee-employer relationship. This step in the characterization process is not explicitly discussed in the present decision, although it is obviously necessary in order that the second step—the choice of "connecting factor"—may be made. For example, if this action were initially found to be based on contract, it would be necessary to inquire as to where the contract was made and where it was to be performed; if these places were different, resort to conflicts rules would be necessary to select the controlling law. If the action is initially found to sound in tort, it is usual to select the place of injury as the connecting factor, and to apply the *lex loci delictus.*

Thus, this particular suit unquestionably lies in the general field of tort law; hence, applying California conflicts rules as required by *Klaxon v. Stentor El. Manufacturing Company,* 313 U.S. 486, 487, the Court *next* determines that the appropriate connecting factor is the place of injury. In this case the injury occurred in the State of Oregon and so Oregon law is to be applied in resolving all questions of substance in the case. (See Cormack, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 S. Cal. L.R. 221 *et seq.*)

We quite agree that the question of *initial* characterization described above must be resolved by application of the forum law, for until the problem is classified as to the general field of law applicable, we are at a loss to determine the conflicts rule which

will in turn decide for us whether the forum or foreign law is to be applied to the solution of the principal question.

Thus forum law had to be applied to determine initially that this was a case falling in the general category of torts. This was necessary in order that California conflicts rules could in turn be applied to select Oregon law as applicable because Oregon was the place of injury. However, the Court has assumed that forum law must also apply to determine the nature of the cause of action for the purpose of applying the correct statute of limitations. *But this does not necessarily follow.* The characterization process is not *per se* concerned with this latter question since it is possible to make the general choice of law merely by categorizing the action as one in tort. The "characterization" which "should be made in accordance with the law of the forum" does not preclude a further inquiry to determine which law should define the nature of the cause of action. As to this point, we believe Oregon law must be applied if constitutional principles are to be followed. As we have said in our earlier brief, it seems inconsistent to us that while seeking a remedy which requires the recognition of Oregon statutes, appellant would nevertheless deny the force of Oregon decisional law interpreting those self-same statutes and holding that actions brought thereunder are suits for personal injuries as at common law. To our minds, the faithful application of the full faith and credit clause necessitates the adoption of the case law as

well as the public acts of the foreign state, and hence requires recognition of the Oregon rule that the second cause of action here is not on a liability created by statute.

This Court has noted in its decision that the case of *Shelton v. Paris,* 199 Ore. 365, 261 P. 2d 856, has to do particularly with the Oregon Employer's Liability Act, Oregon Revised Statutes, Section 654.305 *et seq.,* and implies that we cannot also conclude therefrom that actions under the Oregon Workmen's Compensation Law, Oregon Revised Statutes, Section 656.002 *et seq.,* are likewise common law by nature. We should perhaps have noted earlier that in addition to the cases from other jurisdictions cited in our previous brief holding such actions to be common law, there is also a decision of this Court, *Van Norden v. Charles R. McCormick Lumber Company of Delaware,* 27 Fed. 2d 881, 1928, which holds that the Compensation Act does not create a new cause of action. The pertinent language of the Court is as follows:

> "The contention is that, because of another provision of the act withdrawing from the employer so electing, the fellow servant defense available under the common law, plaintiff exhibits a new and distinct cause of action. In this view we cannot concur; *the Compensation Act does not purport to create a new cause of action.* In terms it declares that upon the exercise of such option the 'employer shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or

> wrongful act, as if this act had not been passed, and in any action brought against such an employer . . . it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman.' " (Emphasis ours.)

As can be seen from this case, Oregon definitely regards causes of action under the Oregon Workmen's Compensation law such as the one here to be common law in nature and as not being founded upon a new liability created by statute. If, as has been argued, the first *Rideaux* case (*Rideaux v. Torgrimson,* 12 C. (2d) 633, 86 P. 2d 826), means that California holds otherwise as to its somewhat similar statute (California Labor Code, Section 3706 *et seq.*) a clear conflict between California and Oregon law is presented as to the second cause of action here.

We again submit that proper application of the full faith and credit clause demands that Oregon's view of the nature of its own statute be adopted and we deny that the process of characterization necessitates application of forum law as to the principal question involved in this case.

Now are we able to follow the Court's suggestion that to do so would be to allow Oregon to construe California's statute. The meaning of the term "liability created by statute" as used in California Code of Civil Procedure, Section 338(1) is not at issue here, for that statute means just what it says. The only issue is as to the *application* of the statute to

the Oregon cause of action. The resolution of this question is a matter for the application of California conflicts rules (*Klaxon v. Stentor, Etc.,* supra) and as we have argued elsewhere, California in such a situation would apply the foreign law. See *State of Ohio ex rel. Squire v. Porter,* 21 C. 2d 45, 129 P. 2d 357; *State of Indiana v. Hoffman,* 53 C.A. 2d 706, 128 P. 420. In citing merely *Bank of U.S. v. Donnally,* 8 Pet. 361, as sole support for its conclusion the Court fails to indicate that it has followed California conflicts rules in this particular.

III.

IN ANY EVENT CALIFORNIA NOW CONCLUDES, AS DOES OREGON, THAT ACTIONS UNDER THE WORKMEN'S COMPENSATION LAW ARE SUITS AS AT COMMON LAW FOR PERSONAL INJURIES, HENCE TO BE GOVERNED BY THE ONE-YEAR STATUTE OF LIMITATIONS.

This Court in its present decision correctly concludes that there is no conflict of law between Oregon and California as to the purported cause of action under the Oregon Employers' Liability Act, since both states recognize that such actions are not upon a "liability created by statute". *Shelton v. Paris,* 199 Ore. 365, 261 P. 2d 856; *Rideaux v. Torgrimson,* 39 C.A. 2d 273, 102 P. 2d 1104. However, the Court reaches a different conclusion as to the alleged cause of action under the Oregon Workmen's Compensation law, stating that California holds such actions to be statutory in nature and citing the first *Rideaux* case (12 C. 2d 633, 86 P. 2d 826).

Because we did not fully explore the history of the similar legislation in California in our earlier brief, we believe that we should now advert to recent decisions of the California Courts which indicate that the first *Rideaux* decision is no longer good law and that the present view of the California Courts is that actions brought under California Labor Code Section 3706 *et seq.* are not upon a liability created by statute, but are simply extensions of the pre-existing common law right of the employee to sue his employer for personal injuries.

In California at the present, an injured employee has three possible remedies against his employer depending upon his status at the time of the injury:

1. The first and most predominant remedy is a proceeding before the Industrial Accident Commission under the Workmen's Compensation Law, this being the exclusive remedy against the employer where the conditions of compensation concur. California Labor Code Sections 3600, 3601.

2. The second remedy exists in favor of those few persons who are not regarded as employees under the statutory definition of the Workmen's Compensation Act, such an agricultural workers and part-time domestics. Such persons may sue their employers directly as at common law and in such action the doctrine of comparative negligence applies. California Labor Code Sections 2800-2804. It is this type of action which has been likened to the Employers' Liability Act of Oregon and which has properly been held to be an action at common law rather than one upon a liability created by statute.

3. The third type of action arises where the conditions of compensation concur but the employer has nevertheless failed to insure his liability. (California Labor Code, Section 3706 *et seq.*) In such actions negligence of the employer is presumed and contributory negligence is not a defense.

(For a discussion of these remedies, see *Mantonya v. Bratlie,* 33 C. 2d 120, 123; 199 P. 2d 677, and *Devens v. Goldberg,* 33 C. 2d 173, 176; 199 P. 2d 943.)

The first *Rideaux* case was an action of the third type, and the question of applicability of various statutes of limitation was in no way involved. The whole issue was whether a cause of action survived, since the defendant employer died prior to the filing of suit. The California Supreme Court, recognizing the general common law rule that there is no survival of tort actions, nevertheless held that this action survived because by Labor Code Section 3706 the legislature provided a statutory cause of action for personal injuries different from that of the common law. However, the Court also held that the legislation was part of a complete statutory scheme intended to provide full coverage for injured employees, and concluded that by virtue of the legislative intent the action was meant to be one which survived. The reference to Labor Code Section 3706 as providing a statutory cause of action is actually not essential to the *Rideaux* decision, in view of the holding as to the legislative intent. Furthermore, it is no longer necessary to regard such actions as statutory, since

California now follows the rule that actions for personal injuries survive the death of the tort feasor. (C.C.C.P. Sec. 376.)

In any event, the first *Rideaux* case failed to take into account certain provisions of the California Labor Code which indicate that such actions are as at common law, and has apparently since been superseded by more recent decisions holding that a specific statute of limitations must control over a general one.

In California Labor Code, Section 3602, it is said:

> "In all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division had not been enacted."

This statute has since been construed in *Popejoy v. Hannon,* 37 C. 2d 159, 173; 231 P. 2d 484, where it is said:

> "In all cases where the conditions of compensation do not concur, the liability of the employer is governed by the law of negligence * * * . The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute."

It cannot be doubted that an action such as appellant's first cause of action here is one "not covered by the statute," for California Labor Code, Section 3706, provides:

> "If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by

> filing an application for compensation with the Commission, and in addition may bring an action *at law* against such employer for damages, *as if this division did not apply.*" (Emphasis ours.)

We believe it follows from the foregoing authorities that only the Workmen's Compensation Act itself, with its proceeding before the Industrial Accident Commission, is a liability created by statute in California, and that the other two remedies are simply a preservation of the common law right of the employee against the employer (albeit certain defenses are abolished).

In any event, the recent case of *Aetna Casualty & Surety Co. v. P.G.& E.,* 41 C. 2d 785, 264 P. 2d 5, makes it clear that where a choice exists between a specific statute (such as the statute of limitations for personal injuries) and a general statute (such as the statute of limitations for liabilities created by statute), the conflict must be resolved in favor of the application of the more specific statute.

In the *Aetna* case, the employer's insurance carrier sued a third party, which had allegedly caused the employee's injuries, by virtue of the statutory subrogation provided in the California Labor Code (Cal. Labor Code, Sec. 3850 *et seq.*) The action was brought more than one year but less than three years from the date of the injury. In an effort to secure a recovery for the injured employee as well, the plaintiff insurance carrier joined a cause of action in his behalf, to which a demurrer was sustained upon

the ground of the one-year statute of limitations for personal injuries (C.C.C.P., Sec. 340 (3)). The decision of the Supreme Court of California affirms this conclusion *because the employee's action is one for personal injuries controlled specifically by C.C.C.P. Sec. 340 (3), and the general statute, C.C.C.P. Sec. 338 (1) has no application.* The Court states:

> "The employee's general damage claim, whether prosecuted by the employee personally or by his employer or its insurance carrier on his behalf, is solely one in tort for personal injuries arising out of the negligence of the third party tort feasor; hence the cause of action accrues at the time of the negligent act. No matter who may be the party plaintiff, the cause of action is one within the express terms of subdivision 3 of Section 340 of the Code of Civil Procedure.
>
> "That section is a special statute controlling the time within which any action covering such injury may be commenced, and it prevails over the general statute applicable to actions based upon a 'liability created by statute.' (C.C.C.P. Sec. 338 (1))"

We believe that this decision, although involving other sections of the California Labor Code, makes it clear that the California Supreme Court now regards actions such as the second cause of action here to be controlled by the more specific personal injury statute of limitations and not by the general (and longer) statute of limitations applicable to liabilities created by statute. As is said in *Miller and Lux v. Batz,* 131 Cal. 402, 404, 63 P. 680:

> "The fact that the obligation is *evidenced* by statute does not render the plaintiff's cause of action one 'created' by statute." (Emphasis ours.)

It follows that California now regards suits such as appellant's second cause of action here in the same light as does Oregon, that is, as simple personal injury actions. Thus, whether California or Oregon law be applied to determine the nature of the cause of action, the result is that both causes of action here are barred by California Code of Civil Procedure Section 340 (3).

IV.

IT IS NOT CONCEDED THAT A CAUSE OF ACTION IS STATED BY EITHER COUNT OF APPELLANT'S PRESENT COMPLAINT.

This Court's present decision states:

> "It is conceded by the parties that the allegations of the complaint, as to each cause of action, are sufficient to state a cause of action under Oregon law, which said law allows suit by an injured Oregon employee against his employer in such circumstances as were here alleged."

Although the question of whether or not either count of the present complaint states a cause of action was not raised upon this appeal, we did not mean thereby to concede away what may be a meritorious defense, should this action proceed further. In fact, in our answer to the first amended complaint filed with

the United States District Court on April 7, 1954, it is stated:

"First Defense:

"Plaintiff has failed to state a claim upon which relief can be granted."

The sufficiency of the causes of action stated in the present complaint has not therefore been determined, and it is respectfully requested that the Court amend its present decision to reflect this fact, lest it later be urged by appellant that this point has been stipulated. We do not concede the existence of a cause of action and will raise this question at the appropriate time.

V.

CONCLUSION.

This has been a case of unusual interest from a legal standpoint, being one which goes to the very heart of principles of conflict of laws. Realizing that the best solution to such problems is to harmonize apparent conflicts between the laws of different states, we earnestly suggest that the Court in this case can resolve the apparent conflict either by concluding that Oregon law should apply uniformly to all but the procedural questions or by concluding that both California and Oregon regard their somewhat similar statutes as codifications of existing common law rules and not creators of new liability. It is therefore respectfully submitted that a rehearing should be

granted in this matter for consideration of the questions raised herein.

Dated, San Francisco, California,
September 8, 1955.

Respectfully submitted,
KEITH, CREEDE & SEDGWICK,
FRANK J. CREEDE,
SCOTT CONLEY,
Attorneys for Appellee and Petitioner.

Certificate of Counsel

Scott Conley, of counsel for appellee herein, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for purposes of delay.

Dated, San Francisco, California,
September 8, 1955.

Scott Conley,
Attorneys for Appellee and Petitioner.